Pepperdine Dispute Resolution Law Journal

Volume 11 | Issue 3 Article 11

4-1-2011

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[Vol. 11: 467, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

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I. INTRODUCTION

The neutrality of the mediator has always been the constitutive idea informing the ideology of mediation. It is considered a necessary condition not only for conducting proper mediation but also for the very existence of the process called mediation. The absence of neutrality undercuts the foundations of mediation, so that it is no longer mediation but some other process altogether. "Non-neutral mediator," therefore, is an oxymoron.[1]

In various laws,[2] mediators' ethical codes,[3] and in the mediation literature,[4] the term "neutral" appears as the heading for the titles of a third party that assists in resolving disputes. This use of the term points to the fact that the neutrality of the mediator not only manifests an aspiration for proper professional practice, it also establishes everyone who practices mediation as possessing the quality of neutrality.[5]

In consequence of this perception, neutrality received the status of self-evident. It is no wonder, then, that over the course of the past two decades only a few studies have been published that deal with the subject. Its neutral status generally camouflages the need for discussion and analysis.[6] This is

1. *See* SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES 153-54 (2005); Christine E. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW AND SOC'Y REV. 709, 729 (1988).

2. *See, e.g.*, 5 U.S.C. § 573 (1996); 28 U.S.C. § 653 (1998).

3. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

4. *See, e.g.*, STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 3 (1992).

5. Janet Rifkin, Jonathan Millen & Sara Cobb, *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 151-52 (1991).

6. *Id.*

the reason that empirical studies on mediation do not document the practice of neutrality or view it as a concept in need of deconstruction and elucidation but view it as an empirical fact requiring measurement and nothing more. The diagnosis of the mediator's neutrality usually amounts to the subjective judgment of the parties.[7]

It is my contention that the taken-for-granted status of neutrality is to a great extent a direct outcome of its proximity to the idea of judicial impartiality: the mediator, like the judge, bears the obligation of impartiality and is obliged to maintain an equal distance from the parties involved. Some scholars argue that the notion of mediator neutrality provides a legitimizing framework in aligning mediators with judges.[8] The issue I shall discuss in this article is whether the concept of mediator neutrality advances the empowering and effective participation of parties from disadvantaged groups.

The next section will deal with the relationship between the concept of neutrality in the adversarial legal process, in the mediation process, and the concept of procedural justice. I shall then present the meanings ascribed to the concept of mediator neutrality in the two prevailing models of mediation: the problem-solving model and the transformative model. The affinity between these meanings and the concept of judicial impartiality will be discussed and critiqued. Finally, I shall suggest an alternative mediation ethic to neutrality that, in my opinion, may well increase the chances of furthering empowered participation among disadvantaged groups. The last part of the article will present the narrative mediation model and examine the mediation ethic on which it is based.

II. THE RELATIONSHIP BETWEEN THE THIRD PARTY'S NEUTRALITY AND THE PRINCIPLES OF PROCEDURAL JUSTICE

A. Introduction: The Opposition Between Mediation and Law

The concept of empowerment has long played a crucial role in establishing the standing of mediation as a process that has the potential to provide alternative justice to that offered by the formal law of the state. Since its appearance in North America in the mid-1970s, its proponents have described it as a fairer alternative than law in general and litigation in

7. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 37 (1991).

8. Kathy Douglas & Rachel Field, *Therapeutic Jurisprudence: Providing Some Answers to Neutrality Dilemma in Court-Connected Mediation*, *in* 3RD INTERNATIONAL CONFERENCE ON THERAPEUTIC JURISPRUDENCE: TRANSFORMING LEGAL PROCESSES IN COURT AND BEYOND 67 (Greg Reinhardt & Andrew Cannon eds., 2007).

particular.[9] The alternative vision offered by mediation speaks about novel forms of justice, different from traditional ways through which law and justice are claimed to come together. This form of alternative justice expresses dissatisfaction with legal reforms that fall short of their promise to ameliorate social and economic inequality; it offers, instead, a vision of self-sustaining individuals who acquire the tools and skills to shape their own lives. The underlying assumption of mediation is that at least some individuals in given communities, although not having a claim to any specific expertise, nonetheless possess the ability to solve their own disputes without recourse to the courts of the state. This new form of justice has been described as being of a higher quality than traditional legal justice because it is sensitive to ethnic, cultural, racial, and gender differences, as well as to the impact of sentiments and emotions on the evolution of disputes and the ability to settle them.

Mediation is generally presented in the professional literature in opposition to the legal process in regard to three principal aspects.

1. Parties' Control of the Process

In contrast to the legal process, in which the parties are represented by a lawyer—an expert in legal language[10]—the parties in mediation are in control of both the process and the outcome. Their control is manifested in the manner of their participation. Unlike the formal legal process, mediation is a flexible process, without hardened rules and procedures. It enables the parties to "tell the story" in their own, everyday language.[11] The control of the process leads to control of the outcome: the parties are active participants in shaping a solution to their dispute instead of mere passive spectators of their lawyers who take center stage.[12] The solution is agreed on, and authority for the decision is left in the hands of the parties instead of being entrusted to a third party, a judge. The process is voluntary; each party can

9. *See generally* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987) (discussing how consensus-building approaches such as negotiation and mediation can be more effective than litigation).

10. Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Judicial Subject,* 66 DENV. U. L. REV. 437, 483 (1989).

11. JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 39, 42 (1998); Christine Harrington, *The Politics of Participation and Nonparticipation in Dispute Processes*, 6 LAW & POL'Y 203, 209 (1984).

12. JEROLD AUERBACH, JUSTICE WITHOUT LAW? 10 (1983).

walk out at any time without any explanation or reason and without any sanction being levied,[13] in contrast to the obligatory nature of the legal process, which does not allow unilateral departure.

2. Neutral Mediator and the Absence of a Decisive Authority

The autonomy of the parties and the high level of their control of the process and of the outcome necessitates that the mediator's power be limited and that there be no authority to decide the dispute.[14] The mediator is, then, the neutral third party, whose task is limited to assisting the parties to conduct negotiations between themselves. Even though the mediator generally presents herself as an expert in dispute resolution, this expertise is manifested in the ability to conduct the process eye-to-eye, so to speak, to create open and fair communication with the parties and between the parties, to acquire their trust, and to aid them to identify their needs and interests. This is unlike the legal process, in which the judge, whose position is above that of the parties, not at eye level, decides the conflict on the basis of legal rules.

3. A Solution Responding to the Needs of the Parties

In contrast to formal adjudication, in which a solution to the dispute is arrived at by means of classifying the problem into categories having objective and universal validity, mediation is intended to solve the specific problem that exists between specific parties. The dispute is not solved by applying a general norm, but the parties themselves are the ones that create the relevant norms and tailor their suit[15] with the aid of the mediator. The particularistic norms offer a creative response to the parties' special needs[16] and are not necessarily based on legal rights.[17] Resolving the dispute by way of talking with each other and offering an answer to the special needs of

13. Edward Kruk, *Mediation and Conflict Resolution in Social Work and the Human Services: Issues, Debates, and Trends*, *in* MEDIATION AND CONFLICT RESOLUTION IN SOCIAL WORK AND THE HUMAN SERVICES 1, 5 (Edward Kruk ed., 1997).

14. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 50-53 (1996); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 56.

15. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 327-28 (1971); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145, 146 (1988); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 16-17 (2000).

16. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving* 31 UCLA L. REV. 754, 804-09 (1984).

17. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 25-26 (1981).

each side enables a continuation of relations and communication between them, instead of breaking off connection and separation, which are by-products of an enforced hierarchical decision.[18] Special needs might include emotional needs,[19] which are not recognized in law as worthy of a response.

B. Between Procedural Justice and Empowerment

The idea of controlling the process expresses a perception of procedural justice whereby having control over the procedural aspects of dispute resolution constitutes a fair procedure that paves the way to a just result.[20] This perception has support in empirical studies conducted by Thibaut and Walker in the 1970s that found a direct relationship between the degree of the parties' control of the process and their sense of the fairness of the process and the result.[21] According to these studies, the greater the sense of control that the litigants experience over the procedural aspects related to a settlement of the dispute, such as presenting arguments and evidence, the more they evaluate the result as fair, even if it was not the result for which they had hoped.[22] The explanation Thibaut and Walker give to these findings is that controlling the process is experienced by the participants as indirect control of the result.[23]

Studies in the 1980s and 1990s found that control of the process has importance in and of itself, even without any direct affinity to the possibility of controlling the outcome.[24] For example, it was found that parties who received an opportunity to fashion the rules of the procedure themselves experienced a significantly high sense of fairness of the process and the outcome.[25] Another study, which investigated subjective perceptions relating to reasons for obeying the law, found that the legitimacy of the law to dictate behavior stemmed not only from its deterrent element but also

18. CONLEY & O'BARR, *supra* note 11, at 41, 48.

19. MOORE, *supra* note 14, at 162-69.

20. For the concept of procedural justice, see ALAN LIND & TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) and RITA C. MANNINO & RENE TRUILLO, SOCIAL JUSTICE IN A DIVERSE SOCIETY (1996).

21. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE (1975).

22. *Id.*

23. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546-47 (1978).

24. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 116-17 (1990).

25. Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, *in* JUSTICE AND POWER IN SOCIO-LEGAL STUDIES 323 (Bryant G. Garth & Austin Sarat eds., 1997).

from the importance that people attributed to a just result that is obtained in a fair procedure.[26] It also found that the more the decision-making process is experienced as fair, the more the outcome is perceived as just; and the feeling of the commitment to uphold it increases even among those whom the decision did not favor.[27] Still another finding was that obtaining the chance to speak is perceived as having an importance of its own, without connection to the issue of whether one's case did impact the outcome.[28] According to Tyler, receiving the opportunity to speak and present one's argument before an authoritative party, like a judge, increases the speaker's sense of self-value.[29] Support for this explanation may be found in a later study that showed that an attitude of politeness and respect on the part of the authority created the feeling that the process was fair.[30]

All of these findings might show that mediation is a process embodying principles of procedural justice to a significant extent, for the degree of control that it imparts to the parties surpasses that of the adversarial process and covers every dimension of the process. Indeed, various studies have found that a method that is flexible and informal, characterized by tailored rules of procedure, self-defined subjects for the agenda, and self-responsibility for the dispute and settlement to the parties, intensifies the parties' sense of fairness of the procedure and its outcome.[31] Various scholars have argued that a high level of control of the process and its result creates greater procedural justice[32] and increases the chances that the parties to mediation will experience empowerment.[33]

According to this conception, empowerment of the parties is an inherent product of their participation in a process that embodies principles of procedural justice. The empowering potential of controlling the process may be realized by developing dispute-settlement skills; establishing relations of mutual respect, trust, and understanding; and improving the sense of self-value.[34] This conception is based on the premise that when free and conscious choice is effected by autonomous individuals who are capable of identifying their own needs and of agreeing to a solution that responds to

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26. TYLER, *supra* note 24, at 117, 150.

27. *Id.* at 150.

28. *Id.* at 104.

29. *Id.* at 147.

30. Tyler, *supra* note 25, at 326-27.

31. Harrington, *supra* note 11, at 211-12; Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 257 (1981).

32. Tyler, *supra* note 25; LIND & TYLER, *supra* note 20, at 121-22.

33. Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).

34. *Id.* at 267-68; Fuller, *supra* note 15, at 325-27.

these needs, this increases their ability to act as agents.[35] A mediator who wants to further empowerment in mediation is obliged, then, to leave as high a level of control as possible in the hands of the parties and to encourage them to put into effect autonomy, choice, and self-determination.

In the following sections, I will examine the extent to which the perception of neutrality advances principles of procedural justice. First, I will present the concept of judicial impartiality and examine the reciprocal relations between it and the idea of the parties' control of the process.

C. Judicial Impartiality

> *"We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."*
> – Benjamin Cardozo[36]

The notion of judicial impartiality is considered the breath of life of adjudication,[37] a sine qua non for conducting a fair procedure and attaining a just outcome. Impartiality not only manifests an aspiration for proper judicial practice, it also is thought to be a supreme judicial virtue[38] that is vital not only to assuring the fairness of the particular process but also to guaranteeing the public's trust in the judicial system in general.[39]

In the adversarial legal process, the concept of judicial impartiality is intended to assure fulfillment of the central characteristic of the adversarial process; namely, entrusting control of managing the process to the litigants and their lawyers. In effect, it may be said that judicial impartiality and the parties' control of the process are two sides of the same coin. Without judicial impartiality, there is concern that control of the process will be withdrawn from the litigants and be transferred to the judge. On the other side of this coin, the litigants' control of the process advances the idea of

35. Menkel-Meadow, *supra* note 15, at 22; CARRIE MENKEL-MEADOW, DISPUTE PROCESSING AND CONFLICT RESOLUTION—THEORY, PRACTICE AND POLICY xvii (2003).

36. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

37. Lord Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 3-4 (1976).

38. *Id.* at 4.

39. MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY—A COMPARATIVE APPROACH TO THE LEGAL PROCESS 135 (1986); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605 (1996); Murray Gleeson, *Public Confidence in the Judiciary*, 76 AUST. L.J. 558 (2002).

judicial impartiality and is perceived as a guarantor of its fulfillment.[40] With the litigants as the main players, the judge is able to remain in a relatively passive position where the judge's principal function is to administer a process that allows equal competition between the litigants. Placing the ball in the hands of the parties themselves gives them complete responsibility for their success in winning the adversarial competition. Specifically, each party needs to make the utmost effort to present a convincing story to the court. In other words, each must present a narrative that contains a more faithful version of past events. Each party must convince the court that their narrative is the real story and that the other party's story never happened or is not reasonable. Each party also needs to give suitable legal dress to their respective factual version. A litigant who tells a story whose inherent qualities are objectively more convincing will be the one to win the competition.

Judicial impartiality has two dimensions: procedural and substantive. At the procedural stage of the legal process, the principle of impartiality contains two principal aspects: maintaining equal distance from the parties and the judge's absence of interest in any one of the parties or in the outcome of the dispute.

Maintaining equal distance is manifested in the structure of an equilateral triangle or triad.[41] The triangular structure demonstrates an equal distance between the judge, who sits at the vertex, and both of the parties. On the surface, equal distance can be maintained by both passive behavior and active, involved behavior. However, the commonly accepted meaning of the obligation is low judicial involvement and not taking a position in the dispute, which presumably assures that control of the competitive game will remain in the hands of the parties themselves.[42] The triangular structure is vital for guaranteeing the legitimacy of the judicial decision in the eyes of the parties and in the eyes of the public at large. The decision of a judge who abandons the triangular structure and creates a coalition of two against one will be perceived as illegitimate.[43]

The necessity of maintaining equal distance creates another obligation: the judge must not have any interest in any of the parties or in the outcome of the dispute. Such interest can prevent the judge from displaying an equal measure of openness toward the arguments of each party, which might then

40. *See* DAMASKA, *supra* note 39, at 136.
41. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-2 (1986).
42. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).
43. SHAPIRO, *supra* note 41, at 22-26.

undermine the triad and create a real concern of partiality in conducting the trial.[44]

In the pure adversarial model, the two meanings of judicial impartiality facilitate a mental and emotional condition of tabula rasa. The ideal of a clean slate means, first and foremost, a stance of ignorance in relation to the facts. In the adversarial system, all the facts need to undergo filtering through a competitive process of proof even if some of these facts are already known.[45] Reliance on information that has not been filtered might harm the reliability of the fact-determination process and make it difficult for the judge to weigh the evidence objectively. Thus stems the requirement to base the judicial decision only on the facts of the specific case as proved by the parties and not on facts not introduced in evidence.[46]

It is incumbent on the judge generally to practice a tabula rasa norm not only in relation to the facts but also as to the legal situation. Except for cases in which the legal situation is simple and clear, the judge must be devoid of any prior legal stance in regard to the case so that the litigants' means of convincing may bear fruit and influence the decision.[47] It follows that the judge must refrain from raising arguments at her own initiative that have not been argued by the litigants and she must be careful to give justifiable grounds for the decision so that the litigants may realize that their participation did indeed influence the result and that their arguments were taken into consideration.[48]

At the substantive stage of the adversarial legal process—the judicial decision stage—the principle of impartiality takes on another meaning: objectivity.[49] The objective decision is one based on legal rules, in contrast

44. Shaman, *supra* note 39, at 620; Keith Mason, *Unconscious Judicial Prejudice*, 75 AUSTL. L.J. 676 (2001). The disqualification test according to Israeli law is the test of a "real concern" of partiality. Courts Law [consolidated version], 5744-1984, 38 LSI 271 (1984) (Isr.). The Israeli Supreme Court held that the real concern test is an objective test, according to which a decision must be made on the basis of the entirety of external circumstances whether a reasonable judge can continue to judge the matter. *See* Yedid v. State of Israel P.D. 29 (2) 375 [1975] (Isr.). This differs from the "appearance of partiality" test, which is an examination of the impression created in the public at large or the assumed reaction of the reasonable person, and is the accepted test in Anglo-American courts. MODEL CODE OF JUDICIAL CONDUCT Canon 3.E.1 (2007).

45. DAMASKA, *supra* note 39, at 138-39.

46. *Id.*

47. *Id.*

48. *See* Fuller, *supra* note 42, at 388.

49. *See* Shaman, *supra* note 39, at 606-07.

to subjective perceptions and opinions.[50] Legal rules are considered a source of universal validity that supplies the legal decision with its required objective basis. These rules are comprehended as a coherent system, as closed, and as having a distinct rationale of its own, within which one may find the answers to all the questions relating to the social reality.[51] The subjective perceptions and beliefs of the judge are not considered part of the legal body of knowledge, and therefore bringing them to bear is thought to be dangerous because it might sacrifice the appearance of impartiality that only exists when the judge takes pains to act according to the guidelines of the legal rules.[52]

The image that relates to the process of an objective decision is that of the goddess of justice, whose eyes are covered so that even the sight of the litigants will not influence her so that she will be partial toward one of them. The image of the goddess of justice demonstrates the concept of a "veil of ignorance" as defined by Rawls:[53] it is incumbent on the judge—like the goddess of justice—to place himself behind a veil of ignorance to be able to ignore the differences between the litigants and to make an objective ruling.[54] Impartiality is connected with demonstrating an identical relation toward everyone involved in the given situation.[55] Placing oneself behind a veil of ignorance is intended to make the identity of the litigants and even that of the judge irrelevant to the decision.[56] In other words, even though at this stage the judge can no longer be neutral in the sense of not taking a stand in the dispute—which was of central significance at the procedural stage of the process—relying on legal rules with their objective and universal validity enables the judge to add and preserve a stance of impartiality; for the decision—despite its involving someone who won and someone who lost—is based on exogenous rules with an independent existence that dictate the result to the judge.[57]

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50. *See id.*; Devlin, *supra* note 37, at 4.

51. *Cf.* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (arguing that nihilism makes judicial impartiality virtually impossible).

52. *See* Devlin, *supra* note 37, at 4; AHARON BARAK, INTERPRETATION IN LAW Vol. 2, 659 (1993) [Heb]; Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 25 (2003) (discussing the role of time and place in judicial determinations).

53. JOHN RAWLS, A THEORY OF JUSTICE 12 (2005).

54. YOTAM BENZIMAN, UNTIL YOU ARE IN HIS PLACE—ETHICS, IMPARTIALITY, AND PERSONAL RELATIONS (1995) [Heb.].

55. *Id.*

56. *Id.* at 87.

57. *See* Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 CHI. L. REV. 661, 663 (1960); Robert Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 205-09 (1990) (noting that judges frequently employ monologue

The procedural aspect and the substantive aspect of judicial impartiality maintain reciprocity of mutual dependence. On the one hand, a process conducted by a judge devoid of favoritism who keeps an equal distance from both parties and enables them to compete equally and to have an equal opportunity to argue their respective cases is considered a sine qua non for reaching an objective legal result. In other words, it is insufficient that the decision be based on legal rules; rather, it must also take into consideration the arguments of the two parties so that the participation of one of them does not become worthless.[58] On the other hand, without an objective decision that relies on legal rules, the result will appear arbitrary even if a judge who showed no favoritism, who maintained equal distance from the parties, and who gave them an equal chance to present their arguments, conducts the process.

Thus the importance of separating process from content or procedure from substance is the trickling down of the outcome stage into the procedural stage. For instance, if the judge expresses an opinion as to the more believable version or the desired outcome, this might harm the equal competition between the parties and create the feeling that the court has already passed judgment before being supplied with all the evidence and arguments.[59]

However, these two aspects of judicial impartiality have received their share of criticism. One critique pertains to the theoretical separation of the procedural stage of the adversarial process from that of the result or decision. The essence of this criticism is that such a separation does not exist in actuality. In fact, an examination of the performance of the adversarial process shows that it assimilates discursive practices that import the outcome stage into the procedural stage.[60] These practices determine the structure and content of a successful story and begin to shape, while still in the procedural stage, the outcome of the process, while blurring the boundary between process and outcome. In general, they normalize and regiment the stories of the parties, thereby detracting from the parties' effective participation. The trickling down of the outcome into the procedural stage also takes place by exercising practices contrary to the

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voice to indicate to the reader that he or she is making a compelled decision based on legal precedent).

58. *See* Fuller, *supra* note 42, at 388.

59. *Id.*

60. CONLEY & O'BARR, *supra* note 11, at 90; JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 58 (1990).

adversarial participatory ideal, such as the practice of judicial settlement. Various scholars argue that a settlement offered by a judge at an early stage of the proceedings, even before all the evidence and arguments have been heard, harms competitive participation and may create in the parties a feeling that the judge has already formulated an opinion on the desired outcome.[61]

Another criticism that has been lodged regarding the principle of impartiality and objectivity originated with Legal Realism and continued with the Critical Legal Studies Movement and the Feminist Movement.[62] The Realists were the first to shake the trust in relating to law as a closed system of rules.[63] They argued that the legal body of knowledge does not constitute a final and closed system and that it cannot supply final answers to all questions.[64] Even the formalist assumption of the existence of an autonomous and rational legal logic—by means of which experts apply the legal doctrine of concrete cases—has come in for withering criticism: it was argued that judicial objectivity is nothing but a myth, the function of which is to mask the influence of the judge's particularistic viewpoint on her decisions.[65]

The Critical Legal Studies Movement's criticism focuses on the reciprocal relations between the dominant culture and prevailing conceptions on the one hand, and the power transmitted to courts to interpret the law on the other.[66] According to this criticism, the myth of the judge as "observing without a perspective"[67] serves the court to exert cultural control and create the social world by naming it:[68] the court is authorized to declare rights and to define injustices; to constitute meaning to everyday events; and to supply a system of categories and frameworks through which the world can be

61. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 385 (1982); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

62. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 578 (1984); Shaman, *supra* note 39, at 626.

63. Trubek, *supra* note 62, at 578.

64. *Id.*

65. CARDOZO, *supra* note 36, at 11-12; Shaman, *supra* note 39, at 615-16; Charles B. Clark & David M. Trubek, *The Creative Role of the Judge and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 263-66 (1961); JEROME FRANK, LAW AND THE MODERN MIND (1930).

66. Shaman, *supra* note 39, at 626; Mason, *supra* note 44, at 656; Edward G. White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 651-53 (1984).

67. CRAIG CALHOUN, CRITICAL SOCIAL THEORY: CULTURE, HISTORY, AND THE CHALLENGE OF DIFFERENCE 187 (1995).

68. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS 8-9 (1990); *see also* Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1691 (1989).

interpreted and the cultural meaning of fairness, justice, and morality shaped. The means of constituting a meaning is hegemonic: the system of beliefs of the cultural elite, with which the judge is generally counted, is presented as necessary and objective, when in actuality it is often arbitrary and subjective. In this way, the system's belligerent nature is camouflaged and receives legitimacy.[69]

Feminist jurists such as Catherine MacKinnon and Martha Minow[70] continued this criticism, arguing that liberal law reflects and reproduces patriarchal values.[71] They claim that the process in which the court classifies the problem brought before it into legal categories is arbitrary and structured as a logical pathway leading to the one truth, leaving the legal category transparent and taken for granted.[72] The arbitrary nature of the classification process lies in the fact that classification is generally done by choosing another characteristic, such as handicapped or motherhood, to represent the gamut of a person's or a group's identity.[73] In consequence, the category obtains the power to determine the characteristics of the person or group slotted into it and to turn them into a kind of status.[74] Variance is presented as intrinsic to the person or group when it is in effect nothing but a product of changeable social perceptions.[75]

The perception of the neutrality of the mediator is influenced to a great extent by the two aspects of the concept of judicial impartiality. I will expand on this issue in the next section.

D. The Neutrality of the Mediator

1. Introduction: The Hybrid Nature of Mediation Participation

Despite the theoretical proximity between the mediator's neutrality and judicial impartiality, the two concepts differ in two central aspects. First, a judge is not authorized to meet separately with one of the parties because it

69. *See* Yngvesson, *supra* note 68, at 1691; MERRY, *supra* note 68, at 7-10.

70. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 109 (1989); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

71. Minow, *supra* note 70, at 16.

72. *Id.* at 34-36; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 44 (2000).

73. AMSTERDAM & BRUNER, *supra* note 72, at 43-44.

74. Minow, *supra* note 70, at 34.

75. *Id.* at 49-50.

is considered harmful to equal competition and might create a real concern of partiality—or at least the appearance of favoritism.[76] In contrast, the mediator is not only allowed to meet with each party individually as he deems necessary, but such separate meetings serve as the heart of the process of identifying the needs and interests to be mediated and is tied to building rapport between the mediator and the parties.[77] Second, the mediator, unlike the judge, is not authorized to decide a dispute.[78] The mediation, characterized by quasi-democratic aspects, aspires to intensify the degree of control allowed the parties and to leave in their hands exclusive control of the outcome.[79]

The foregoing differences between the neutrality of the mediator and judicial impartiality emanate, in my opinion, from the hybrid nature of mediation participation, which combines democratic principles with principles of adversarial competition. The import of the principle of impartiality from the adversarial process is meant to enable the mediator to be an equal distance from the disputing parties and to maintain the fairness of the proceedings, whereas the relations of trust that the mediator forms with the parties, mainly in the course of caucusing, enables the mediator to help them cooperate and to lead them to an agreement on an outcome that satisfies their needs and interests. The combination of impartiality and trust is meant to enable the mediator to conduct a quasi-democratic process that leaves sovereignty over the process and the outcome in the hands of the parties, while maintaining the triad structure that is obligated by the adversarial competition between the parties.

The mediation literature deals generally with two models: the problem-solving model (which is the more frequent of the two) and the transformative model. The two models differ from each other first and foremost in the goal of mediation. According to the problem-solving model, the end of mediation is to solve the problem and to settle the dispute through an agreement.[80] In contrast, the objective of the transformative model is not to settle the dispute, but to engender a transformation between the parties that is of two dimensions: empowerment and recognition. A mediation has fulfilled its transformative objective when these two dimensions are

76. Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992); Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1355-56 (2000).

77. Rifkin et al., *supra* note 5, at 153, 157-58.

78. MOORE, *supra* note 14, at 52.

79. *Id.*

80. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING WITHOUT GIVING IN (1983); Menkel-Meadow, *supra* note 16, at 758; MOORE, *supra* note 14, at 52.

manifested in the process even if the process does not end in an agreement.[81] The perception of the mediator's neutrality plays a vital role in both models.

2. Neutrality According to the Problem-Solving Model

The accepted meaning of neutrality according to the problem-solving model is defined by Moore, who is of the opinion that the mediator's neutrality has two dimensions: neutrality and impartiality.[82] Neutrality is related to mediator-parties relations, and it generally means the absence of any previous connection between them.[83] If there is or was such a connection, the mediator must not show any preference toward that party.[84] Impartiality is related to the position that the mediator takes in regard to the dispute.[85] The mediator must be free from personal or professional interests in any of the parties, in their interests, or in a certain outcome.[86]

Moore clarifies that neutrality and impartiality do not mean the absence of a personal opinion regarding the desired result, which is not possible in any event.[87] The obligation incumbent on the mediator, in Moore's opinion, is not to evade a personal opinion, but to suspend it in order to be able to fulfill a commitment to help the parties to reach a decision of their own.[88] The ultimate test of the existence of neutrality, in his opinion, is the subjective judgment of the parties.[89]

As to the scope of neutrality, Moore makes a distinction between process and content.[90] In his opinion, the role of the mediator is to conduct a

81. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) [hereinafter BUSH & FOLGER, RESPONDING TO CONFLICT]; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 73-74 (rev. ed. 2005) [hereinafter BUSH & FOLGER TRANSFORMATIVE APPROACH].

82. MOORE, *supra* note 14, at 50-51.

83. *Id.* at 52.

84. *Id.*

85. *Id.*

86. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf; UNIF. MEDIATION ACT §9 (amended 2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.

87. MOORE, *supra* note 14, at 50-51.

88. *See id.* at 53.

89. *Id.* at 54.

90. *Id.*

fair process, not to advance any specific outcome.[91] Therefore, the mediator must demonstrate complete neutrality and avoid expressing a stand on the result of the dispute.[92] Nonetheless, neutrality of this scope is not possible in relation to conducting the process.[93] Therefore, whereas in relation to the outcome the mediator must take care to remain neutral to leave control in the hands of the parties, in the matter of the process neutrality is to be manifested in maintaining fair procedural standards.[94] Maintaining procedural fairness, though, may oblige the mediator to stray from his formalistic neutral position and to take an active, involved stance.[95]

Rifkin, Millen, and Cobb define the practice of neutrality in a somewhat different fashion.[96] In their view, neutrality has two aspects: impartiality and equidistance.[97] Impartiality means the absence of a personal interest in the parties or in the outcome of the dispute.[98] The mediator must suspend personal judgments and outlooks, as well as private emotions and agendas.[99] Impartiality is manifested in taking a passive, formalistic position, in maintaining distance, and in the lack of any emotional involvement.[100]

Equal distance is maintained by helping each party to express its side of the dispute to be able to identify their respective interests. This requirement is based on the assumption of the importance of exposing all hidden interests generating the dispute so as to be able to reach a just agreement.[101] Fulfilling this objective necessitates that the mediator adopt an active stand; namely, to create symmetry between the parties.[102] This is done by the mediators temporarily linking up with each party and entering into a temporary condition of partiality to encourage each party to tell their story.[103] Equal distance is maintained between each of the parties at the conclusion of the process.[104] In general, this stage occurs in the course of the caucuses.[105]

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91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 53.
96. Rifkin et al., *supra* note 5, at 152.
97. *Id.* at 152.
98. *Id.*
99. *Id.* at 151-53.
100. *Id.*
101. Cobb & Rifkin, *supra* note 7, at 46-47.
102. *Id.*
103. *Id.*
104. *Id.* at 43-46.
105. *Id.* at 46-47.

Rifkin, Millen, and Cobb think that the idea of preserving equal distance contradicts the notion of impartiality: whereas impartiality is connected with demonstrating a similar attitude toward both sides without relating to their personality and their preferences, maintaining equal distance—as it occurs at the caucus stage—is connected with creating a personal relationship between the mediator and the parties.[106] Whereas impartiality is connected with adopting the viewpoint of a neutral observer who is not sensitive to the differences between the parties, a personal relationship obligates the mediator to focus on a concrete other, one having a unique face and special needs, and to form relationships of trust and closeness with that other.[107]

For these reasons, Rifkin, Millen, and Cobb argue that a paradoxical relationship exists between the two aforementioned aspects of neutrality.[108] It is impossible to adopt a stance of distance, characterized by passivity, objectivity, and the absence of an emotional connection, which are also characteristics of impartiality, while forming trustful relationships with the parties and showing empathy and support for them.[109] In those researchers' opinion, the caucuses might undermine the triad structure and create feelings that the mediator is forming a coalition with one party.[110] When this becomes clear to the mediator, internal pressure arises to resume the formalistic position of impartiality.[111] The transition from one position to the other, Rifkin, Millen, and Cobb argue, sends the parties a mixed message and makes things difficult for the mediator.[112]

Cobb and Rifkin claim that the aforementioned paradoxical structure is a product of the tension between two basic assumptions of the neutrality concept.[113] The first assumption is that the necessity for neutrality in relation to content is broader than in relation to process.[114] This assumption stems from the perception that exclusive control of the outcome is in the hands of the parties and the role of the mediator is procedural in essence.[115]

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106. Rifken et al., *supra* note 5, at 152.

107. Cobb & Rifkin, *supra* note 7, at 46-47. For the tension between impartiality and personal relations, see BENZIMAN, *supra* note 54, at 87.

108. Rifkin et al., *supra* note 5, at 152.

109. Lisa Parola Gaynier, *In Search of a Theory of Practice: What Does Gestalt Have to Offer to the Field of Mediation?*, 7 GESTALT REV. 180, 192 (2003).

110. Rifkin et al., *supra* note 5, at 153-55.

111. *Id.*

112. *Id.*

113. Cobb & Rifkin, *supra* note 7, at 46-47.

114. *Id.*

115. *Id.*

Because the parties are responsible for the agreement, the basis of the mediator's responsibility for substantive justice drops away.[116]

The second assumption is that the mediator's role is to assist the parties in exposing their interests so they can come to an agreement embodying procedural justice.[117] On the basis of this assumption, the mediator manages not only process but also content. If in the mediator's opinion the agreement is not fair, he must not stand aside: he must become involved and act toward advancing a just agreement. A mediator who fulfills this role takes responsibility for substantive justice.[118]

From the foregoing, it seems that the paradox between the two aspects of neutrality is a product of the desire to confine the role of the mediator to process only and to minimize the mediator's impact on outcome, a desire that does not accord with the inherent affinity between process and content.

Bush and Folger argue that the problem-solving model creates a hidden interest to solve the dispute in the mediator, which causes the mediator to use procedural practices that necessarily influence the outcome.[119] These practices are manifested in the overt or covert pressure exerted on the parties to come to an agreement instead of leaving decision-making in their hands.[120] In consequence, the agreement does not respond to the needs of the parties as they see them, but to their needs as perceived by the mediator.[121] Based on Silbey and Merry's study,[122] Bush and Folger identify three types of procedural practices that influence the outcome:[123]

1. *Diagnosing the dispute.* Diagnosis of the characteristics of a dispute is accomplished through mapping the subjects in dispute, evaluating the extent to which a common denominator exists between the parties, and assessing the chances for reaching an agreement.

2. *Activating procedural strategies that impact the terms of the agreement.* The clearest procedural strategy is to focus on one solution that, in the mediator's view, is the most desirable, without examining other options.[124] Generally the parties are unaware of this practice, and therefore they express no objection to it.

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116. *Id.*
117. *Id.*
118. *Id.*
119. BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 74-76, 104.
120. *Id.*
121. *Id.*
122. Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986).
123. BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 64-70.
124. CONLEY & O'BARR, *supra* note 11, at 54-55.

3. *Removing problematic topics from the agenda.* Topics stricken from the agenda will generally be those that lessen the chance of reaching an agreement. At times, these will be sensitive topics for which it is difficult to find a defined, concrete solution.

In Bush and Folger's argument, these procedural practices allow a mediator to intentionally exert her power covertly to limit the parties' control of the result.[125] The agreement reached in the mediation, in which these practices were used, will exclude, in their opinion, some of the parties' interests in favor of the mediator's interest in solving the problem.[126] This presents a paradox: on the one hand, the objective of the problem-solving model is to bring about an agreement that will satisfy the needs of the parties; on the other hand, when the mediator acts as problem-solver, she necessarily uses practices that direct the parties to a desired agreement while dimming their needs.[127] These procedural practices illuminate the problem connected with grounding the notion of neutrality on a distinction between process and content.

The principal reason for this problem is the hybrid nature of mediation, which combines principles of democratic participation and principles of adversarial-competitive participation.[128] Democratic participation is embodied through the sovereignty of the parties over both the process and the outcome.[129] Competitive participation, in contrast, emanates from the dispute between the parties and, in general, necessitates the involvement of a third party, which detracts from their sovereignty.[130] On one hand the mediator aims for neutrality to further the democratic process, thus fulfilling the principle of self-determination.[131] On the other hand, a mediator's neutrality attempts to come as close as possible to the model of judicial impartiality, which embodies the covert effect of a third party on the result.[132]

125. BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 72-73.
126. *Id.* at 105-06.
127. *Id.* at 75.
128. *Id.* at 72-73, 105-06.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 72-73.

The distinction between process and outcome has been criticized even in the context of judicial impartiality.[133] In mediation, this distinction is all the more problematic because process and content have a mutual affinity and, in effect, are inseparably interconnected: the agreements reached by the parties are formulated continuously during the process, not only at its conclusion. Similarly, whereas active judicial involvement in the adversarial process at the argument-presenting stage might create a real concern of partiality, the mediator's involvement in the conduct of the mediation process is thought to be an inherent part of the mediator's role.[134] An active mediator who presents open-ended questions to the parties and whose ear is attuned to their needs and interests is encouraging participation, not harming it.[135]

The tension between the direct affinity of process and content in mediation and the attempt to ground the concept of the mediator's neutrality on a distinction between process and content is especially problematic in situations where a power gap exists between the parties. These situations pose a special challenge to the mediator. Leaving full sovereignty over the outcome in the hands of the parties might harm the fairness of the process and end in an agreement that neglects the weaker party. Alternatively, involvement in power relations—for example, by adopting practices to empower the weaker party—might be perceived by the stronger party as impinging on the equal distance between the mediator and each of the parties.[136]

The literature dealing with the problem-solving model does not analyze this dilemma sufficiently and generally attributes decisive significance to the principle of self-determination without relating to the affinity between certain parties and the political and social structure.[137] Moore, for instance, contends that self-determination is the most important principle in the mediation process, and therefore as a rule the mediator must refrain from becoming involved in power relationships.[138] An exception to this rule, in his opinion, is open violence by one side or situations in which the parties are about to reach an agreement that is unfair, non-implementable, or non-sustainable.[139]

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133. *See* Bush, *supra* note 33, at 258.

134. *See id.* at 282.

135. *See id.*

136. MOORE, *supra* note 14, at 68-69; Susan N. Exon, *How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators?* 5, 7, 20-27, 46 (The Berkeley Electronic Press, Working Paper No. 1540, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=7078&context=expresso.

137. MOORE, *supra* note 14, at 74-76.

138. *Id.*

139. *Id.*

Taylor proposes to exchange the concept of formal neutrality for a model of expanded neutrality.[140] Expanded neutrality would entitle a mediator to employ techniques of influencing and directing a party to the content—power balancing included—when in the mediator's opinion it is vital to reach an agreement that will respond to the needs of the parties. In Taylor's opinion, a too-firm commitment to the principle of neutrality might constitute an obstacle and lead to an agreement that will not respond to the parties' true needs.[141] Nevertheless, she is of the opinion that the mediator has to refrain from exerting overt pressure on the parties to adopt a certain position or to accept an agreement that they do not really want.[142] Such a practice will not be neutral even under the expanded approach.[143]

These outlooks are based on a limited perception of power, one that takes into consideration only overt power. They do not deal with the manner in which power gaps originating in the social, political, and cultural structure affect the autonomy of the parties.

3. Neutrality according to the Transformative Model

Bush and Folger recognize the problem of distinguishing between process and content and are aware of the influence of the mediator on process and content alike.[144] Nonetheless, they claim that this influence stems from the ideology of the problem-solving model and may be overcome by means of an alternative neutrality concept that recognizes the influence of the mediator both on the process of mediation and on its outcome.[145] According to this concept, the power of the mediator may be harnessed for the very purpose of intensifying the parties' autonomy.[146] In other words, it is true that the mediator will use power, but not for the purpose of directing the parties to a certain result. This concept of neutrality manifests the mediator's commitment to use power to ensure the parties' exclusive control of the outcome.

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140. Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process*, 14 MEDIATION Q. 215, 224-225 (1997).

141. *Id.*

142. *Id.*

143. *Id.*

144. BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 105.

145. *Id.*

146. *Id.*

This meaning of neutrality, according to Bush and Folger, increases the chances that the agreement—if reached—will reflect the interests of the parties, and not those of the mediator.[147] Therefore, neutrality in this sense advances the ends of the transformative model: empowerment and recognition.[148] Empowerment, according to this model, is based on the assumption that the expertise of the parties in regard to their own problems and needs is greater than that of the mediator.[149] This perception obligates the mediator to assume a passive stance and to greatly minimize the extent of his involvement in the decision-making process: the mediator's role should amount to a reflection of what the parties said, summative statements, clarification of differences of opinion, illuminating mutual understandings, and so forth.[150] According to this approach, instead of leading the parties to what in the mediator's eyes is the desired solution, the mediator should follow in their footsteps.[151] It follows that the mediator must refrain from exerting pressure on the parties[152] or from giving them professional or other advice.[153] Similarly, the mediator must avoid employing power-balancing practices because doing so may lead to making premature assumptions about power relationships that are not necessarily based on what the parties feel.[154] Intervening in power relationships under these circumstances might weaken the parties, not empower them.[155] Therefore, such involvement must be limited only to circumstances in which clear signs exist that one of the parties is troubled by the lack of equilibrium.[156] Moreover, even when the parties reach an agreement the mediator believes unfair, the mediator must

147. *Id.* at 105-06.

148. BUSH & FOLGER, TRANSFORMATIVE APPROACH, *supra* note 81, at 249-51.

149. *Id.*

150. Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation*, 22 NEGOTIATION J. 331, 339-40 (2006).

151. BUSH & FOLGER, TRANSFORMATIVE APPROACH, *supra* note 81, at 248.

152. Bush, *supra* note 33, at 282-83.

153. BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 95-96.

154. Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice,* 13 MEDIATION Q. 263, 268-69 (1996). In the second edition of their book, Bush and Folger refrain from discussing the concept of the mediator's neutrality. This might point to the fact that they retracted their original concept of neutrality, but could offer no alternative notion. Nevertheless, from the mediation processes exemplified in the book, especially that of "The Purple House," which was directed by Bush himself, it seems that radical neutrality practice, manifested in the mediator's passive stance, continues to fulfill a respected role in the transformative model. *See* BUSH & FOLGER, TRANSFORMATIVE APPROACH, *supra* note 81, at 131.

155. Bush & Folger, *supra* note 154, at 268-69.

156. *Id.*

refrain from judging it so long as it reflects, in his opinion, the free will of the parties.[157]

This concept of neutrality overcomes, on its face, the paradox that arises in the problem-solving model, a paradox that derives from basing the notion of neutrality on a distinction between process and content. This distinction makes it difficult for the mediator to determine when to become involved in content and the proper scope of such involvement. The transformative model attempts to deal with this dilemma by adopting a quite inflexible concept of impartiality.[158] In other words, whereas the concept of neutrality that is customary in the problem-solving model is a dual notion combining impartiality and trust relations, neutrality according to the transformative model concedes the dimension of trust relations; it is left only with a concept of impartiality similar in essence to that practiced in the pure adversarial model, a concept that generally limits the practice of holding caucuses.[159] In contrast to the adversarial process, however, in which the passive judicial stance is taken only in relation to process—because the outcome is determined by the judge's decision—the mediator in the process conducted according to the transformative model may assume a passive position toward both the process and the content, given the assumption that this increases the parties' chances of becoming empowered.[160]

The concept according to which a "clean" stand of impartiality intensifies empowerment has been criticized.[161] This notion, it is argued, creates a narrow perception of empowerment based on an assumption of the radical autonomy of parties that does not recognize the effect of structural limitations on the ability to participate in mediation effectively.[162] According to this criticism, the acquisition of personal skills, such as the ability to conduct negotiations, is insufficient in itself to enable parties from disadvantaged groups to participate in mediation as agents, so long as there is no accompanying development of a critical consciousness toward the hegemonic social order.[163] In the absence of such a consciousness, these

157. *Id.* at 268.

158. *Id.*

159. *Id.* at 268-69.

160. *See id.*

161. *See generally* Peter Adler, *The Ideologies of Mediation: The Movement's Own Story*, 10 LAW & POL'Y 319, 333 (1988).

162. *See generally id.*

163. Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 102-03 (1996).

parties cannot recognize the legitimacy of their position and employ the skills they have acquired.[164] The structural limitations might necessitate that the mediator provide these parties with active assistance to be able to act as autonomous agents:[165] a mediator who chooses to hide behind a veil of ignorance and demonstrate intentional blindness toward power gaps that originate in structural limitations frustrates the fulfillment of the objectives of the transformative model.[166] These goals do not accord with impartiality.

Furthermore, the adoption of an inflexible concept of impartiality also embodies a paradox. Despite the fact that the transformative model seeks to advance empowerment and recognition as its objectives and to pave the way for a society of relationships, its perception of neutrality actually undermines this objective because it does not advance relationships between the mediator and the parties.[167] As Kuttner argues, the model is interested in advancing relations among the parties themselves; however, the mediator is missing from those relations.[168] The neutral perception of impartiality is based on an erroneous assumption that so long as the mediator reveals a greater degree of passivity and remains distant from communication between the parties, their autonomy will strengthen and their chances of undergoing empowerment increases.[169] However, a stand of non-involvement, as Kuttner notes, does not necessarily advance empowerment.[170] Gaynier, too, argues that to create the kind of contact between the parties that will enable them to see each other's viewpoint and to develop new possibilities, a passive stand and refraining from judgment are insufficient; what is required is the active intervention of the mediator.[171] In her opinion, Bush and Folger's concern that mediation activism will cause the mediator to not act impartially does not hold.[172] The best way of coping with the fear of partiality is, in her opinion, to be aware of its existence and to recognize the limitations stemming from it.[173]

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164. *Id.*

165. Gaynier, *supra* note 109, at 192, 194.

166. *Id.*

167. *See id.* at 192.

168. Kuttner, *supra* note 150, at 340-42.

169. *See* Gaynier, *supra* note 109, at 191.

170. Kuttner, *supra* note 150, at 340-42.

171. *See* Lisa P. Gaynier, *Transformative Mediation: In Search of a Theory of Practice*, 22 CONFLICT RESOL. Q. 397 (2005).

172. *Id.* at 406.

173. *Id. See also* Daniel Bowling & David A. Hoffman, *Bringing Peace into the Room, in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 13, 21-22, 39-40 (Daniel Bowling & David A. Hoffman eds., 2003).

The approach in which a stringent perception of impartiality is adopted to intensify empowerment creates yet another paradox: this approach is based on the assumption that it is possible to increase the democratic-empowering characteristics of mediation through adopting an ethical stand originally intended for a competitive-adversarial process that does not entrust the parties with decision-making power. Like the judge, the transformative mediator stands behind a veil of ignorance, taking a passive stance, remaining at a distance from the parties, and refraining from any intimate situation or establishing relationships of trust—except that this time, such a stand is meant to encourage democratic participation that realizes the principles of empowerment and recognition instead of an objective decision by a third party.

This concept of neutrality creates a new kind of hegemonic narrative: a narrative of pure neutrality that turns mediation into a democratic forum clear of power that enables the parties to experience empowerment. This is a radical individuation narrative free of the influences of the social and political structure.[174]

The hegemonic narrative camouflages the effects of covert power practices that are put into effect even in a mediation conducted by a mediator who is not fully motivated to reach an agreement. As Gaynier states, at times, the very presence of the mediator in the room is enough to impact the content even if the mediator makes no sound.[175] The hegemonic narrative of absolute neutrality as an empowerment mechanism also denies covert power developed by the parties among themselves that is not necessarily manifested in open coercion or violence. Thus, a party who is fluent in the language of the experts might employ power over non-fluent parties. In those circumstances, the mediator's passive stand of non-involvement will give validity to the covert preference that exists in the discourse to the language of experts, thereby allowing alternative narratives, such as narratives of relationships, to be excluded from the mediation.

4. Neutrality as a Regulatory Mechanism

In the introduction to this part, I briefly mentioned that the neutrality of the mediator is a hybrid combining two dimensions: impartiality and trust.

174. EDWARD W. SCHWERIN, MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS 66-70 (1995).

175. Gaynier, *supra* note 109, at 192.

Rifkin, Millen, and Cobb argue that continuous tension exists between these two dimensions.[176] I now want to look closely at this tension.

The duty of impartiality is considered a necessary condition, one that is self-evident, for the fairness of the whole process of dispute resolution in which a third party is involved. Generally, this requirement is identified with the role of the judge in the adversarial procedure and is considered vital to gaining trust in the specific judge as well as gaining the public's trust in adjudication. For the judge to maintain impartiality, the adversarial process sets down formal rules, the objective of which is to prevent intimacy and over-proximity between judge and litigant. The judge sits at a physical distance from the litigants, generally on a raised platform, addresses the lawyers and not the litigants directly, and is forbidden to hold private meetings with them.[177]

Whereas the duty of impartiality is meant to create distance and formal relations, the requirement of gaining trust is intended to achieve the opposite goal: forming trustful relations. To fulfill this goal, the mediator creates intimacy with the parties by sitting close to them, addressing them directly in everyday language, and meeting privately with them. Such meetings are of central importance in mediation. In the course of the meeting, the mediator assists the parties in identifying their needs and interests, earns their trust, and receives information that can aid in solving the dispute. These objectives cannot be realized in a joint meeting, which is usually characterized by an atmosphere of tension, suspicion, and even hostility.

Gaining the parties' trust applies not only to the mediator but also to other professionals, such as lawyers and psychologists. Nevertheless, it has two special characteristics in mediation: first, it applies to disputing parties who are situated on both sides of the barricade; second, it integrates the requirement of impartiality. In this regard, I have commented elsewhere as follows:

> The duty of neutrality is unique to the mediator and does not apply to other professionals. The lawyer, psychologist, social worker, or physician bears a duty of trust toward a person or persons situated on the same side of the barricade. In contrast, the obligation of gaining trust on the part of the mediator covers parties who are situated on both sides of the barricade; and in multi-party disputes, envelops many parties, whose interests might differ and even be contradictory. Whereas the lawyer is strictly forbidden to represent opposing parties on the same issue, the function of the mediator is by its very nature to assist the parties to the dispute in conducting negotiations among themselves.

176. Rifkin et al., *supra* note 5, at 152.

177. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1383-89.

> And therefore, there is no other professional occupation, except for mediation, in which the professional bears the duty of neutrality: this applies, as a rule, only to one who holds judicial office. Thus, on the one hand, special relations of trust are formed between the parties and the mediator that are not created with a judge; such relations are more similar in essence to those created with professionals. On the other hand, the duty of neutrality that is incumbent on the mediator is reminiscent, at least in its impartiality aspect, of judicial neutrality, which does not apply to other professionals.[178]

The combination of impartiality and trust creates special tension for the mediator. This tension does not exist in the adversarial process where the judge bears a duty of impartiality alone. It also does not appear in lawyer-client relations, for instance, in which the duty of trust applies just toward the client, and does not cover the client's rival.

In my opinion, a close examination of this tension reveals that it does not reflect two aspects of neutrality but two different ethical concepts:[179] an ethic of impartiality and an ethic of care. The former reflects objective justice and fairness, manifested in a passive stance, distance, and standing behind a veil of ignorance; in other words, it allows for the observation of the dispute and the parties to it from a bird's eye view or from nowhere. This ethic is what creates the problematic distinction between process and content, which does not allow the mediator to intervene in the content of the dispute. In contrast, the ethic of care means responsibility toward the other party and concern for that person's needs; it is manifested in forming a personal relationship with each side and showing empathy, involvement, understanding, and support. This latter ethic might necessitate that the mediator intervene in the content of the dispute. An ethic of impartiality is characterized by blindness toward differences between parties, whereas an ethic of care manifests itself in seeing the parties' unique faces and showing sensitivity toward their distress and the circumstances of their lives.

The two ethical concepts maintain a "structural coupling" relationship,[180] marked by dialectic characteristics: each concept simultaneously imparts legitimacy and challenges the other. The ethic of impartiality bestows on the mediator the halo and prestige of the judge and awards her the status of an expert in dispute resolution, while the ethic of care enables the mediator to stand in opposition to the judge by not having

178. Ronit Zamir, *The Confidentiality Between the Mediator and the Parties to Mediation*, *in* JUDGE URI KITTAI BOOK 45, 61-62 (Boaz Sangero ed., 2007) [Heb].

179. For the two concepts of morality, see BENZIMAN, *supra* note 54, at 87.

180. For the notion of "structural coupling," see Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval*, 17 LAW & SOC. INQUIRY 11, 33-38 (1992).

power and by being placed in the arena of care, concern, and communication, in which individuals are free to reach solutions that respond to their needs.

The affinity that is created between mediation and law through the ethic of impartiality is meant to give mediation a basis of professionalism and to enable those who practice it to achieve closure and distinction through their expertise in dispute settlement, similar to that of a judge.[181] Additionally, this affinity is intended to increase the attractiveness of mediation in the eyes of potential parties and to market it to institutional bodies, such as the courts, as an effective and fair process. The practices that create this affinity include: an emphasis on the mediator's expertise in the area of disputes,[182] affinity to the courts, and giving an appreciation of the court's expected outcome. This affinity is especially prominent in mediation programs operated in the shadow of the court. In this sense, the affinity between mediation and the court acts to stress the similarity between the function of the mediator and that of the judge.[183] As Douglas and Field stated:

> The problem-solving nature of court-ordered mediation is comparable to the court-ordered nature of litigation; and the notions of mediator neutrality arguably make problem-solving models of mediation credible, because *there is an overt connection with the language and ideology of judicial impartiality.* This is an aspect of court-ordered mediation that possibly draws potential parties to the mediation process; that is, because of neutrality's promise of fairness and its offer of protection against biased or unfair practice. *Such protections connect problem-solving mediation with the authority and legitimacy of formal legal adjudication processes.*[184]

Whereas the ethic of impartiality portrays mediation as having a direct affinity to law, the ethic of care not only denies a connection between mediation and law, it seeks to establish mediation as an antithesis to it, as a democratic and empowering process, in which individuals can employ autonomy and conscious choice and freely reach an outcome that fits their needs.[185] The mediator assists the parties in fulfilling these goals through strengthening their autonomy and improving relations between them.[186] The mediator must listen to their personal narrative and demonstrate empathy and concern toward them.[187] The attentive mediator, sensitive to the distress

181. *See* RONEN SHAMIR, THE COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE 116 (2000).

182. Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. SOC. ISSUES 11, 15 (1985).

183. Douglas & Field, *supra* note 8, at 72.

184. *Id.* (emphasis added).

185. *Id.* at 82.

186. *Id.*

187. *Id.*

of the parties, is portrayed as one who is powerless, as an antithesis to a judge. The mediator sits around the same table as the parties and speaks their every day language. The mediator does not aspire to lead the parties to an objective outcome that stems from exogenous legal rules, but assists them in expressing their subjective needs and in reaching an agreement that will respond to those same needs.[188] In other words, the caring mediator is not situated behind a veil of ignorance, but is sensitive to differences between parties, their unique faces, and their personal voices.

The duality of the affinity to law and opposition to law establishes mediation as a regulatory forum in which both a juridical-negative power and a disciplinary-positive power operate simultaneously.[189] Mediation is established in opposition to law as a democratic arena in which responsible individuals, who are free and autonomous, participate by themselves and are capable of making decisions that best serve their interests.[190] Alternatively, mediation is established "in the shadow of the law"[191] to grant it legitimacy and to portray all those who practice mediation as having the quality of neutrality.

This duality operates to mask the power that is at work in mediation. It is manifested in the operation of routine mediation practices that are perceived as a natural part of the mediation process; indeed, the parties—and at times the mediators themselves—are often unaware of their latent power.[192] Thus, this duality creates a "thin" perception of procedural justice that evades informal barriers to participation originating in political poverty and an unequal social structure.[193] The thin conception of procedural justice harms disadvantaged groups' effective participation in mediation and creates a built-in preference for hegemonic narratives; that is, narratives that camouflage the connection between the storyteller and the social structure and preserve existing power relations, which are perceived as natural, self-evident, and therefore, unassailable.[194]

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188. *Id.* at 81-82.

189. *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION 51-52 (1978).

190. *See* Peter Fitzpatrick, *The Rise and Rise of Informalism*, *in* INFORMAL JUSTICE? 178, 190-92 (Roger Matthews ed., 1988).

191. For the phrase "in the shadow of the law" see Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

192. *See* Douglas & Field, *supra* note 8, at 82.

193. *Id.* at 83.

194. *See* Patricia Ewick & Susan Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 214-15, 221 (1995).

One of the principal examples of the operation of a thin perception of procedural justice in mediation is prioritizing narratives of rules over narratives of relationship. As mentioned earlier, the ideology of mediation attributes great importance to relations between parties,[195] in contrast to litigation, which gives clear preference to the language of rules and to the form of rational argument.[196] Still, Cobb and Rifkin's studies show that narratives of relationship receive an inferior status even in mediation, not only in litigation.[197] The reason they give for this surprising finding is that narratives of relationship have an open and unstable internal structure, characterized by a circular story line and faulty temporal continuity.[198] This structure causes narratives of relationship to be perceived as unconvincing and lacking relevance for reaching an agreement. Their lack of stability exposes them to continual undermining and transformation,[199] for instance by their translation into the language of rules. In contrast, narratives of rules are characterized by a coherent, linear, and closed internal structure; being grounded on rational arguments, they create an affinity to the dominant culture and express some hegemonic truth.[200] These characteristics cause narratives of rules to be perceived as possessing internal convincing power, making them relatively stable and lessening the chances of their taking on a renewed interpretation.[201]

Cobb and Rifkin criticize this phenomenon, arguing that it causes educated and fluent participants to receive preference in mediation, while participants from disadvantaged groups do not participate effectively.[202] For example, Kandel's socio-linguistic study of mediation in divorce proceedings shows the following:

> Some parents are much better at meeting the rhetorical burdens of mediation than others. In reading and re-reading the texts of the mediation narratives it becomes obvious to me

195. Menkel-Meadow, *supra* note 16, at 760; BUSH & FOLGER, RESPONDING TO CONFLICT, *supra* note 81, at 81; BUSH & FOLGER, TRANSFORMATIVE APPROACH, *supra* note 81, at 77, 252-53.

196. CONLEY & O'BARR, *supra* note 11, at 67-68.

197. Cobb & Rifkin, *supra* note 7, at 51-57.

198. *Id.*

199. Scott Beattie, *Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants*, 8 AUSTRL. DISP. RESOL. J. 57, 66-67 (1997).

200. Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOTIATION J. 245, 252-53 (1993); Cobb & Rifkin, *supra* note 7, at 52-57; Dale Bagshaw, *Language, Power and Mediation*, 14 AUSTRALASIAN DISP. RESOL. J. 130 (2003).

201. Cobb & Rifkin, *supra* note 7, at 51-54; Cobb, *supra* note 200, at 252.

202. Cobb & Rifkin, *supra* note 7, at 25.

> that those parents who seemed to "tell a better story" garnered the mediator's support behind them and prevailed more often in terms of agreement.[203]

Cobb and Rifkin found that participation in mediation not only fails to advance narratives of relationship, but it furthers an adversarial pattern of relations: most mediation processes examined were characterized by a pattern similar to that of adversarial litigation, of guilt and counter-guilt, reaction and counter-reaction.[204] The narrative that was told first generally became the dominant narrative. Because the first narrative positions the other party as being responsible for the conflict and forces the other to respond to the charge and to deny responsibility, this narrative creates an adversarial pattern of relations in which one party's story is without content of its own and exists only in relation to the first narrative.[205] In some cases, it became clear that the other party does not succeed at all in telling her story; she was preoccupied only in denying the first narrative. In Cobb and Rifkin's opinion, the adversarial pattern, which grants preference to the first narrative, limits the possibility of transformation of the two narratives, because the potential alternative narrative remains illegitimate and untold.[206]

Therefore, the natural preference given in mediation to narratives of rules limits effective participation of parties who are unable to tell their story coherently and logically, whether because the language of rules is not accessible to them or because their interests cannot be given expression in a mediation framework.[207] The covert preference given to the language of rules causes difficulties for participants from disadvantaged groups that superficially receive an equal chance to participate in the process to find, within the dominant language, the voice and words to express their own interests.[208] Furthermore, participation that is restricted to the language of rules will make it difficult to generate a transformation in the dominant narrative because narratives of relationship often represent viewpoints from the periphery. They have the power, when given the chance, to challenge the hegemonic narrative and to pave the way to including new points of view

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203. Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 896 (1994).

204. Cobb & Rifkin, *supra* note 7, at 25.

205. *Id.* at 58.

206. *Id.* at 53.

207. *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 37-39 (2000) (discussing audience preference for logical formulaic articulations in discussions about democratic politics).

208. *Id.* at 119.

in the mediatory discourse.[209] The exclusion of these narratives limits the chances of advancing a transformative participatory process that would expand the ruling viewpoint and open it up to new possibilities. In other words, their exclusion leads to preference being given to hegemonic narratives and the silencing of subversive narratives undermining the hegemonic logic.[210]

Women constitute one of the main groups that may be harmed by the thin notion of procedural justice. As Grillo argues, the ideology of mediation, which attributes importance to communication and to relations and therefore intrinsically conceals assurances to improve the effective participation of women in comparison to litigation, dissipates in effect within unwritten micro-legal norms that exclude the feminine voice and weaken the situation of women in comparison to a court proceeding.[211] What distinguishes the micro-social environment of mediation from today's usual "shoulds," in her opinion, is the existence of a sanction.[212] Many sanctions might be viewed as trivial at first glance: a smile that casually dismisses the words of one of the parties, criticism of someone who does not place a child's needs as a top priority, a guideline not to discuss a certain topic, evading what one of the parties has to say, and so forth.[213]

These micro-legal practices embody a normalizing, disciplinary power, whose objective is to coerce the parties onto the correct path of participation.[214] These practices create inequality between the parties, and they are capable of covertly introducing into mediation quasi-adversarial characteristics. By setting standards for a "normal narrative," they act to discipline and normalize the narrative, determine what language is permitted to be spoken, and what is considered a legitimate narrative.[215] The result is giving preference to the hegemonic narrative, a narrative of rules based on universal claims of truth.

The perception of thin procedural justice is to a large extent a product of adopting a myth of neutrality, which in general remains hidden: the location

209. Cobb, *supra* note 200, at 252.

210. YOUNG, *supra* note 207, at 41-43 (discussing privileged group's exclusion of disharmonious interests in political dialogue).

211. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555-57, 1605-07 (1991).

212. *Id.*

213. *Id.* at 1556.

214. FOUCAULT, *supra* note 189, at 51-52; Peter Fitzpatrick, *The Impossibility of Informal Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 458 (Sally Engle Merry & Neal Milner eds., 1993) (suggesting that mediators maneuver individuals into "certain defining modes of engagement").

215. *See* Fitzpatrick, *supra* note 214, at 458.

of neutrality between law and discipline enables it to act as a barrier blocking the oppositions between them. This double aspect allows it to periodically reveal another face in accordance with the circumstances. If the mediator is suspected of employing power, he can present a face of caring; additionally, if the mediator is suspected of lacking professionalism, he can present a face of expertise and impartiality. Thin procedural justice allows the mediator to show the harsh, coercive face of law or the humane face of concern and care as he deems fit.

The mythical nature of neutrality in general has not been addressed in the mediation literature, but a few researchers deal with it. For example, Cobb and Rifkin argue that neutrality is a folklore term that is simultaneously transparent and opaque: transparent because it is based on self-evident assumptions that are difficult to decompose, and opaque because it is difficult to uncork the nature of the practice of neutrality from the self-evident assumptions that neutrality performs more as a character trait than as a practice.[216] Kolb and Kressel opine that the neutrality myth has a negative effect on the development of mediation as a professional occupation.[217] As they phrase it:

> This masking of pressure tactics has implications for the profession. On the one hand, we have a myth that says mediation is noncoercive. The reality of the conflicts in which they are engaged and the demands of their professional careers means that the impetus to use pressure and coercion is probably inevitable. Frequently, mediators resolve the tension through a kind of denial about what they do. The denial stands in the way of learning and keeps the field from better understanding the uses and limits of pressure.[218]

Despite the fact that structural coupling of impartiality and care generally establishes neutrality as a myth and limits the participation of disadvantaged groups through a perception of thin procedural justice, it has the power, in my opinion, to do just the opposite. The next section will discuss this possibility.

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216. *See* Cobb & Rifkin, *supra* note 7, at 40-41. Cobb and Rifkin found in their research that the mythical status of neutrality made it difficult for mediators to describe their practice of neutrality. According to the researchers, mediators who seek to do so generally make use of another term, which itself is in need of clarification: justice, power, or ideology. *See id.*

217. Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 483 (1997).

218. *Id.*

5. From Impartiality to Equal Partiality

> [O]bjectivity is an achievement of democratic communication that includes all differentiated social positions. Objectivity in political judgment . . . does not consist in discovering some truth about politics or institutions independent of the awareness and actions of social members. But it is also not some kind of sum of their differentiated viewpoints.[219]

The coupling of impartiality and care not only creates a myth of neutrality camouflaging practices of disciplinary power, but it also has the power to create a new ethical concept that will advance principles of "thick" procedural justice, which in turn will increase the effective participation of parties from disadvantaged groups. For this to occur, one has to identify the dimensions of structural coupling relations that can be characterized by mutual challenging. More precisely, one should ask: How may the ethic of care challenge the ethic of impartiality?[220]

Young's concept of objectivity indicates the possibility of mutual challenging.[221] According to Young, for a public sphere to be inclusive, it must be characterized by a high level of objectivity.[222] In this context, objectivity does not mean impartiality or "view from nowhere," rather, it is an expansion of the narrow viewpoint to contain varied points of view.[223] This meaning of objectivity differs from its traditional meaning, which is identified with the idea of impartiality.[224] Young uses an accepted concept to generate a transformation and to impart to it a new meaning: no longer a unified perspective, but a variety of viewpoints.[225]

This transformation is enabled by observing the concept of objectivity from the prism of care. Such an observation undermines the existing meaning of impartiality by mythifying objectivity, thereby enabling the old vessel to be filled with new wine, a new meaning.[226] The new meaning is multipartiality or omnipartiality.[227] This idea deconstructs the dichotomy between partiality and impartiality, between subjectivity and objectivity. It

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219. YOUNG, *supra* note 207, at 114.

220. *Id.* at 112.

221. *Id.* at 114.

222. *Id.*

223. *Id.* at 113-14.

224. *Id.* at 114.

225. *Id.*

226. Alicia Ostriker, *The Thieves of Language: Women Poets and Revisionist Mythmaking, in* THE NEW FEMINIST CRITICISM, ESSAYS ON WOMEN, LITERATURE & THEORY 314, 317 (Elaine Showalter ed., 1985) (defining "revisionist mythmaking" in the context of women poets).

227. The term "omnipartiality" was coined by Cloke. KENNETH CLOKE, MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS 13 (1994).

does not express a unilateral position, nor does it reflect impartiality in the sense of "view from nowhere."[228] It is based on an ethic of showing partiality, but nevertheless does not express giving preference to one of the parties. Its meaning is showing partiality in equal measure.[229]

The ethic of equal partiality embodies relations of mutual challenging, in which care undermines and changes the accepted perception of impartiality[230] so that it will cease to fulfill a function of covert power: instead of looking from nowhere, the third party is now obliged to recognize that she has points of view and must make a conscious effort to identify these blind spots and reveal an openness toward new and different points of view.[231]

A mediator who is committed to the ethic of equal partiality strives to see the unique faces of the parties, listen to their life stories, make an effort to walk in their shoes, and see events from their respective viewpoints. Such a mediator is not interested in establishing himself as an expert in dispute resolution,[232] but is acting as a "story-taker,"[233] someone who is a midwife to the new narrative of the parties and does not give birth to any story himself.[234] The midwifery function necessitates that mediators rise above all

228. *See* YOUNG, *supra* note 207, at 113.

229. *Cf.* BENZIMAN, *supra* note 54, at 123-24.

230. A similar concept of ethics appears at times in community and aboriginal dispute resolution models that are not based on the liberal ethic of impartiality. *See, e.g.*, Madeleine Suave, *Mediation: Toward an Aboriginal Conceptualization*, 3 ABORIGINAL L. BULL. 10 (1996), *available at* http://www.austlii.edu.au/au/journals/AboriginalLB/1996/26.html. On objection to the ethic of impartiality in colonial contexts, see Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts*, 26 LAW & SOC'Y REV. 11, 35-37 (1992).

231. The notion of multipartiality is not necessarily theoretical and is manifested, for instance, in Canadian judicial rules of ethics. ETHICAL PRINCIPLES FOR JUDGES 6 cmt. A.3 (Canadian Judicial Council 1998). In R. v. R.D.S., [1997] 484 S.C.R. 3 (Can.), the judges in the minority clarified their opinion that these rules not only allow the judge to take into consideration a discriminatory social reality, they obligate the judge to do so even if concrete proof of discrimination is not introduced in the specific case. In the opinion of these judges, the explicit recognition of the existence of the social context—which, for instance, is manifested in systematic social discrimination on an ethnic basis—expresses the absence of bias in the deepest sense: it is the meaning of multiple viewpoints instead of the impossible meaning of the absence of perspective or of observing from nowhere. *See id.* (L'Heureux-Dub, J. & McLachlin, J., dissenting).

232. JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 119 (2000) (arguing that mediators earn trust rather than assume it).

233. ADRIANA CAVARERO, RELATING NARRATIVES: STORYTELLING AND SELFHOOD 64 (2000).

234. Sally Engle Merry, *Community Mediation as Community Organizing*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 245, 263 (1997) (referencing Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION J. 17 (1989)).

the limitations of their perceptions and attitudes and believe that their own narratives are in need of expansion through new viewpoints that the parties bring to mediation.[235]

Adopting the aforementioned approach will assist the mediator in helping each party to give birth, as it were, to the meanings hidden away in their narratives, meaning that it has liberating and healing value.[236] Nevertheless, the midwifery function does not conclude with listening to the original dispute story, a story that often hides oppressive hegemonic perceptions; the mediator must be an active partner in the composition of the new narrative: the party cannot be the only author of her life story, for the healing meaning of the narrative is revealed in the main through dialogue.[237]

Because parties find it difficult to converse at the outset of the mediation, the mediator initiates conversation with each parties on a individual basis.[238] This process paves the way for direct dialogue between the parties themselves. To advance such dialogue, the mediator-midwife should try to generate reflective processes that will enable the parties to identify the impact of hegemonic norms on the dispute story and to shake the dichotomous and total world picture that they hold.[239] In such a picture, the parties see themselves or the other as completely good or completely bad, "viewing the past or the future as completely dark or totally clear, seeing any behavior as worthy only of praise or of condemnation."[240] The role of the mediator is to bring about a double view instead of the prevailing one-sided view.[241] This may be done, for example, by posing questions that will create constructive confusion among the parties "and then, in relief . . . reframe the issues with greater focus on the essential substantive conflict . . . . [T]he mediator uses the stress of the circumstances or events as an opportunity to

235. *Cf.* HAYIM OMER & NACHI ALON, THE CASE OF THE THERAPEUTIC STORY 171 (1997) [Heb].

236. *Id.* at 134; Winslade & Monk, *supra* note 232, at 125; Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*, 14 Mediation Q. 201, 202 (1997); Lois Gold, *Mediation and the Culture of Healing*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 183, 193 (Daniel Bowling & David A. Hoffman eds., 2003) (emphasizing the value of mediator compassion); Mark S. Umbreit, *Humanistic Mediation: Peacemaking in Core Social Work Values* (2002).

237. *See* JUDITH BUTLER, GIVING ACCOUNT OF ONESELF 84 (2005); Cavarero, *supra* note 233, at 39-40, 62-63.

238. Kuttner, *supra* note 150, at 341.

239. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 50 (Myra Bergman Ramos trans., 30th anniversary ed. 2007); Isabella R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 15 J. DISP. RESOL. 55, 80 (1995).

240. OMER & ALON, *supra* note 235, at 19.

241. *Id.* at 19-20.

forge a shift in perspectives."[242] The new thinking possibilities will enrich each party's original viewpoint with new fields of meaning and create space for a more complex narrative, one that is rich and multi-vocal.[243]

This process is likely to advance expression of subversive narratives that will challenge the hegemonic narrative and undermine it: while the ethic of neutrality creates hidden barriers to participation that make it difficult for such stories to pave their way to the discussion table, the ethic of equal partiality might assist these stories in gaining attention because it prevents the mediator from hiding behind a false distinction between process and content and compels the mediator to take a stand on issues of social justice.[244] As Winslade, Monk, and Cotter have argued:

> [M]ediators may state openly their opposition to violence, racism, sexism, or class privilege. *They seek to embody in their mediation work an overt bias toward the promotion of social justice.* Keeping these issues in the forefront of consciousness enables, at times, *the deliberate privileging of the voices of those who are usually not listened to.*[245]

Privileging the silenced voices means affirmative action, not giving preference: the silenced voices are in need of the mediator's active assistance to be heard and to gain attention.[246] In contrast, narratives that reflect the ruling viewpoint are generally thought of as self-evident and, therefore, not in need of similar assistance. Equal partiality is intended, then, to realize the principle of essential equality and to enable every voice, including those who have been silenced, to receive an equal opportunity to express oneself and to be heard. "[T]he mediator, as master storyteller, must be able to edit the script of each disputant's story of the conflict and concoct another scenario in which all participants can play a part in the drama."[247]

Affirmative action toward the silenced voices does not mean assuming a relativistic ethical position. In fact, the silenced voices are able to reveal the

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242. Robert D. Benjamin, *Managing the Natural Energy of the Conflict: Mediators, Tricksters and the Constructive Use of Deception*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 79, 96 (Daniel Bowling & David A. Hoffman eds., 2003).

243. *See id.* at 85.

244. *See* Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1029, 1032-33 (2001).

245. John Winslade, Gerald Monk & Alison Cotter, *A Narrative Approach to the Practice of Mediation,* 14 NEGOTIATION J. 21, 25 (1998) (emphasis added).

246. *Id.*

247. Benjamin, *supra* note 242, at 102.

often unethical nature of the prevailing position precisely because it does not fulfill general ethical principles even if it pretends to do so. These voices are often expressed by way of "life stories": narratives that create a connection between the specific conflict and the social structure, between local, context-dependent justice, and general norms of justice.[248] These narratives can advance ethical discussion that strays from the objective of reaching an agreement:[249] through examining the ethical nature of the prevailing position in action, in a specific context,[250] they can illuminate it with new, external points of view in a manner that transforms the familiar into something strange. The estrangement of a self-evident norm liberates it from its "naturalness," paving the way for its undermining and alteration.

Adopting an ethical stand of equal partiality can increase the effective participation of parties from disadvantaged groups in mediation by advancing a dialogue based on principles of thick procedural justice. These principles, according to Bohman's model of dialogic democracy,[251] include exposing the manner in which social traditions and categories considered natural or self-evident affect participants' narratives; deconstructing abstract norms reflecting hegemonic categories and paving the way to their expansion so that they can include voices from the periphery; creating a new pluralistic interpretive framework that contains a variety of viewpoints;[252] and attributing importance to life stories that create a link between personal experience and collective history.[253]

In the following section, I shall present the narrative mediation model and examine whether and how it furthers a dialogue containing principles of thick procedural justice.

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248. *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1625, 1628 (1990).

249. *See* Cobb, *supra* note 244, at 1018-19.

250. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102 (1994); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1716 (1990); Wendy Brown, *Rights and Losses*, *in* STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 97 (1995).

251. *See* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 59-63, 103 (1996).

252. *Id.* at 92-93.

253. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1022-23 (1991).

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III. THE NARRATIVE MEDIATION MODEL

A. Introduction: The Ideology of the Narrative Model

The narrative mediation model was developed by Winslade and Monk in their book *Narrative Mediation*.[254] The authors were deeply influenced by the narrative therapy method developed by Michael White and David Epston in the early 1990s.[255] White and Epston, followed by Winslade, Monk, and others, sought to develop a therapeutic practice that would take into consideration power relations in society, especially those related to gender and to minority ethnic groups, mainly aboriginals.[256]

The point of departure of the narrative mediation model assumes that disputes occurring in the private sphere are influenced by social and cultural norms that are considered self-evident. These norms establish points of view that create, among all of the parties, a different story pertaining to the dispute. Therefore, a condition for constructing a new narrative of relations between the parties is to identify these points of view and unsettle them.

The developers of this model criticized the problem-solving model, which sees the objective of mediation as dispute resolution, based on the needs and interests of the parties.[257] In their opinion, the perception of needs—the unsupplied needs—places the autonomous individual at the center and diverts attention from the fact that needs are in effect a product of social and cultural construction.[258] In order for the narrative model to be able to take power relations into consideration, it must, in their opinion, be based on the assumption that language is performative and that it establishes reality: words are not only a tool for representing reality; they also construct

254. WINSLADE & MONK, *supra* note 232. The possibility of a narrative mediation model was mentioned but not sufficiently developed in several articles in the 1990s. *See, e.g.*, Rifkin et al., *supra* note 5, *passim*.

255. *See* MICHAEL WHITE & DAVID EPSTON, NARRATIVE MEANS TO THERAPEUTIC ENDS (1990).

256. *See id.*; GERALD MONK ET AL., NARRATIVE THERAPY IN PRACTICE: THE ARCHEOLOGY OF HOPE (1997); John Winslade, *Storying Professional Identity*, 4 INT'L J. NARRATIVE THERAPY & CMTY. WORK, 2002, *available at* http://www.dulwichcentre.com.au/johnwinsladearticle.htm.

257. WINSLADE & MONK, *supra* note 232, at 31-54.

258. *See* David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 LAW & SOC'Y REV. 785, 789 (1993); David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, *in* LAW IN EVERYDAY LIFE 123 (Austin Sarat & Thomas R. Kearns eds., 1995).

it and give it meaning.[259] The narrative not only reflects dominant cultural meanings, it also establishes them.[260] These meanings are often a product of presenting viewpoints that serve dominant interests as objective facts.[261] It follows from the performative notion of language that the objective of mediation is not to identify the needs and interests of the parties, but to expose the hidden points of views that constitute these needs and to undermine them.[262] Identifying the various narratives creating the dispute is the first step in building a new interpretation of the history of the dispute—an interpretation based on alternative viewpoints, some of which had been silenced up to now.[263] Mediation that advances processes of deconstructing dominant stories and building alternative narrations constitutes a site for social change.[264]

B. Objectives of the Narrative Model: Deconstruction and Reconstruction

The goals of the narrative mediation model are deconstruction and reconstruction—breaking down the story of the conflict and constructing an alternative story.

The process of deconstruction is intended to undercut the logic of the various dispute stories and reveal the viewpoints that established them. The undermining process paves the way for replacing the narrow and partial narrative of the original dispute story with a new story containing alternate themes of relationships that were either swallowed up within the various conflict stories or that disappeared because they did not accord with the dominant theme. The function of the narrative mediator is to locate the untold experiences that did not find their way into the conflict story and rescue them by integrating them into the new story. The new narrative embodies an expansion of the conflict stories: it is a narrative that contains new themes alongside those that remained from the original conflict stories.[265] The processes of deconstruction and reconstruction are not linear but intertwined, one created within the other.

To advance these processes of deconstruction and reconstruction, Winslade and Monk propose that the mediator make use of what they term

259. WINSLADE & MONK, *supra* note 232, at 3.
260. *Id.* at 40-41.
261. *Id.* at 3.
262. *Id.* at 40-41.
263. *Id.* at 38-39.
264. *Id.* at 40-41.
265. *Id.* at 56.

"dialogic practices."[266] These are characterized by adopting an inquisitive stance.[267] The mediator, in their opinion, does not have to convince the parties what is right for them, but should present them with questions inviting new interpretations and meanings. The objective of these questions is to engender a reflective process that will assist the parties in understanding how the position that they are taking affects the manner in which they perceive both the dispute and the other party, and what the relationship is between this position and accepted social perceptions.[268] The reflective process may assist the parties in identifying the covert healing meanings hiding in their narrative.[269]

The central practice of the narrative model is externalizing the problem. This is intended to aid in deconstructing dominant categories and in identifying the manner in which accepted perceptions and universal truths influence the dispute, as well as establish it:

> The externalization of the problem helps persons identify and separate from unitary knowledges and "truth" discourses that are subjugating in them. In mapping the influence of the problem in the person's life and relationships, these unitary knowledges can be exposed by encouraging persons to identify beliefs about themselves [and] others and their relationships that are reinforced and confirmed by the continued presence of the problem.[270]

According to White and Epston, encouraging narrators to reveal aspects of their stories that have been silenced can open up new meanings that will enable their extrication from the restricted position that the dominant story forced on them.[271]

The dialogic practices of the narrative model are exemplified in Winslade and Monk's book.[272] The first chapter contains a description of the mediation of a custody dispute between Fiona and Greg, a couple in the process of divorce. In court, each side demanded exclusive custody of the children. At the start of the mediation, the couple presented positions characterized by an uncompromising and total narrative: husband and wife attributed to each other full guilt and responsibility for the dispute. The mediator sought to expose the points of view that constituted the total

266. *Id.* at 125-26.
267. *Id.*
268. WHITE & EPSTON, *supra* note 255, at 30.
269. *See id.*; OMER & ALON, *supra* note 235, at 133.
270. WHITE & EPSTON, *supra* note 255, at 30.
271. *Id.* at 15.
272. WINSLADE & MONK, *supra* note 232, at 1-30.

narrative, and toward that end presented questions to each party, in the context of the individual meetings, that were intended to map the social and cultural norms that impacted each one's dispute narrative.[273]

At first, the mediator asked Fiona to detail her opinions about marriage in general and her expectations of marriage to Greg in particular. Fiona related that in the initial period of their marriage, a kind of silent agreement existed between her and Greg to the effect that Greg would see to providing for the family and she would bear responsibility for tending to the house and rearing the children.[274] This division of tasks was modeled, in her words, by their parents.[275] In the next stage, the mediator examined her attitude toward social and cultural norms that influenced the traditional gendered pattern of the division of tasks in the family.[276] Fiona expressed deep regret that she had not expressed more assertiveness in relation to her own needs and aspirations and voiced the feeling that she had sacrificed herself for the sake of caring for the family, while giving up a career of her own and the development of an independent economic capability.[277]

According to Winslade and Monk's analysis, Fiona's narrative revealed several dominant cultural norms that served as the territory from which the conflict sprang, among them the woman's role is submissively fulfilling the needs of her husband; the husband's achievement being her principal source of satisfaction and enjoyment; the woman being responsible for her children's and her husband's social and emotional needs; and the woman having to concede aspirations for a career of her own.[278]

Greg's story was characterized by a total narrative that ascribes to Fiona full responsibility for his suffering.[279] The mediator sought to deconstruct this narrative and to reframe the description, "Fiona is the problem," with an alternative description that related to relations between the couple and to the effects of the dispute on Greg and on the children.[280] To this end, he made use of the technique of externalizing the problem, a technique that is meant to enable a deconstruction of the total unyielding theme and its conversion to alternatives that would turn the problem into a kind of third party, external to the two parties themselves.[281] The alternative themes that were rescued from Greg's narrative were neglect, betrayal, lack of trust, and pain—themes that

273. *Id.*
274. *Id.* at 13-14.
275. *Id.* at 16.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 7.
280. *Id.*
281. *Id.*

expressed the effects of the dispute and its consequences for the two parties without attributing guilt to anyone.[282]

At the next stage, the mediator wanted to map the effects of the conflict on Greg. The latter was asked, among other things, how the conflict had impacted his health and how the growing absence of trust between him and Fiona affected their children.[283] These queries clarified the dominant discursive themes that affected Greg, in particular that of the man as head of the family and exclusive decision maker.[284] Other themes were derived from that particular theme, such as bearing the yoke of provider is the man's central contribution to his family, a good husband is a man who makes a good living, and a woman who leaves her husband betrays the family and loses every right to make decisions pertaining to raising the children.[285] To attempt to deconstruct the discursive category of "family head," the mediator asked Greg how the norm of "a good provider is a man who makes a good living" influences him.[286] Greg expressed his feeling that this norm imposed a heavy physical and mental burden on him, stating that he had already started to reduce his working hours to spend more time with his children.[287]

By deconstructing the discursive themes that constituted the couple's viewpoints of the dispute, the mediator was trying to further the process of building a new narrative that would replace the original total narrative. The path of building the new story was paved by integrating the children's voices in the process.[288] According to Winslade and Monk's analysis, the children's participation in mediation brought about a stop to their serving as an object in their parents' discourse and led to their becoming a subject with a voice of their own.[289] Giving weight to the children's voices also led to a change in Fiona's and Greg's position both on the matter of their children and in regard to themselves.[290] Greg understood for the first time that the children had clear opinions and desires that contrasted with his, an understanding that created an opening to building new relations with

282. *Id.*
283. *Id.* at 16.
284. *Id.*
285. *Id.*
286. *Id.* at 20.
287. *Id.* at 22.
288. *Id.*
289. *Id.*
290. *Id.*

Fiona.[291] He came to see that his struggle to obtain custody of the children stemmed to a great extent from the desire to punish his wife for her decision to end the marriage.[292] With discovery of the first signs of abandoning the authoritative patriarchal position, there was a change, too, in Fiona's attitude toward Greg, and she began to show greater empathy toward him.[293]

C. *Criticism of the Narrative Model*

The theory and practice of the narrative mediation model turned it, in my opinion, into a mediation model with the most significant potential for furthering participation based on principles of thick procedural justice. Nonetheless, and despite its innovation, the model is deficient in two main conceptual aspects: a one-dimensional perception of needs and the absence of an alternative to the ethic of neutrality.

1. One-Dimensional Perception of Needs

The narrative model sharply criticizes the perception of needs that lies at the heart of the problem-solving model. This criticism is based on an inexact and one-sided presentation of the idea of needs, the objective of which apparently is to sharpen opposition between the two models and to highlight the innovativeness of the narrative model. Thus, for example, Winslade and Monk argue that men's need for a career—a need frequently expressed in divorce disputes—is a socially constructed need influenced by a patriarchal sense of entitlement to being "head of the family."[294]

This so-called need is an example of a term that in the problem-solving model might be interpreted as a position, not a need. A mediator who acts according to the problem-solving model might have attempted to reveal needs hidden behind this position through posing open-ended questions, such as why the narrator's career is important to him, how in his opinion career and spending time with the children can be balanced, and so forth. Such questions strive to reveal the various points of view that establish the

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291. *Id.*

292. *Id.*

293. *Id.*

294. *See generally* John Winslade, *Mediation with a Focus on Discursive Positioning* (2003), http://narrative-mediation.crinfo.org/documents/mini-grants/narrative_mediation/Mediation_with_a_Focus.pdf; John Winslade Narrative Mediation: Assisting in the Renegotiation of Discursive Positions, Keynote Presentation at the Dulwich Centre International Summer School (Nov. 19, 2003), *available at* http://narrative-mediation.crinfo.org/documents/mini-grants/narrative_mediation/Renegotiating_Discursive_Positions.pdf.

narrator's position on the subject of career, including viewpoints that are created by the dominant discourse.

In the mediation involving Fiona and Greg, for example, mapping the discursive themes that affected Fiona also exposed her needs, which included: development of economic independence, equal partnership in family decision-making, equality in the division of responsibility for the household, and rearing the children.[295] Mapping of the dominant norms also revealed Greg's needs, such as limiting the number of working hours and spending more time with the children.[296] Greg's and Fiona's needs partially overlap, which might pave the way to an agreement that integrates their needs.[297] Understanding needs to be a by-product of deconstructing positions, rather than a fixed entity determined in advance, brings the problem-solving model closer to the narrative model.

However, though I have reservations about the narrative model's criticism of the perception of needs, it is my opinion that the perception of needs in the problem-solving model may indeed make it difficult to further the effective participation of parties from disadvantaged groups. The reason, as I see it, is that it is quite difficult to translate a party's personal story into a list of needs, and attempts to do so may cause the narrative to lose its uniqueness. Thus, for instance, symbolic values that are incommensurable with rational expression or empirical justification, such as the narrator's identity, special history, morality, feelings, desires, and so on, might be perceived as not containing needs relevant to the settling of a dispute, and so they often undergo filtering from the agenda.[298]

It follows from this criticism that in order for the perception of needs to be able to advance the effective participation of parties from disadvantaged groups, it must be revised in a way that needs will constitute an outcome of the undermining of hegemonic categories. In other words, the process of identifying needs has to be integrated with the exposing of the relationship between the personal narrative and the political, cultural, and social structure. The needs that are identified in such a process will include, almost certainly, not only the personal or psychological needs of the autonomous individual, but also needs that result from gender, cultural, ethnic, or

295. *See* WINSLADE & MONK, *supra* note 232, at 1-30.

296. *Id.*

297. *Id.*

298. *See* Cobb, *supra* note 244, at 1019-20; Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC'Y REV. 1149, 1165-66 (1994).

national belonging. Narratives that express such needs may connect procedural justice to perceptions of universal justice and thereby illuminate the lack of morality of so-called self-evident dominant norms.

2. Absence of an Adequate Alternative to the Ethic of Neutrality

Unlike the problem-solving model's perception of neutrality, which strives to minimize the mediator's effect on content, the narrative model views this effect as desirable:[299] processes of deconstruction and reconstruction occur through integrating the mediator's viewpoints with those of the parties. In the narrative model, the mediator is an active partner in composing the new narrative. This partnership is manifested in the process of midwifery, which is intended to encourage the parties to identify the influence of dominant norms on their dispute stories and to create an alternative narrative that challenges these norms. A narrative mediator is, then, one who possesses political and social awareness.

This perception of the role of the mediator manifests a postmodern philosophy that denies the notion of impartiality. As I have argued in the previous sections, impartiality is based on a unified perspective of "view from nowhere" that avoids differences between the parties and the effects of power relations on their narratives.[300] Such a stand does not accord with processes of deconstruction and reconstruction that connect agent with structure, the small narrative of the narrator with the large-scale narratives of the social structure.[301]

Nevertheless, and in contrast to what may have been expected, Winslade and Monk show ambivalence toward the idea of neutrality; despite their reservations, they do not explicitly renounce it nor do they offer an alternative.[302] This situation leaves narrative mediators without ethical guidelines as to how they should contend with power gaps in the mediation: on the one hand, in recognizing the existence of discursive dominant perceptions structured by the discourse, it is the mediator's obligation to take power relations into consideration. On the other hand, in the absence of an alternative ethic to neutrality, it might be difficult to institute practices that

299. Cobb, *supra* note 244, at 1028-29.

300. *See* YOUNG, *supra* note 207, at 113.

301. Boaventura De Sousa Santos, *The Postmodern Transition: Law and Politics*, *in* THE FATE OF LAW 79, 105, 114-17 (Austin Sarat & Thomas R. Kearns eds., 1991); PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 47-48 (1998); Nancy Fraser & Linda Nicholson, *Social Criticism without Philosophy: An Encounter Between Feminism and Postmodernism*, *in* UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 83, 88-89, 100-102 (Andrew Ross ed., 1989).

302. WINSLADE & MONK, *supra* note 232, at 50.

deal with power gaps. Such practices should be derived from a theoretical conception, but no such theory exists.

The difficulty in developing an alternative ethical conception to that of neutrality causes Winslade and Monk to base the theory of the narrative model on a problematic perception of power that does not accord with the objective of the model.[303] Relying on Foucault's approach to power, they adopt a subversive concept of power that refrains from connecting the small, local narrative of the narrator with large narratives of social structure.[304] They claim that since power relations are created and challenged continually by the discourse during mediation, everyone—including those located on the periphery of society—can object to power relationships, and every participant can become an agent.[305] Thus, they arrive at the conclusion that it is not the function of the mediator to balance power gaps or to advance empowerment processes, for the notion of empowerment does not fit with the perception of subversive power originating in discourse.[306] Instead of empowerment, it is more proper, in their opinion, to examine the manner in which people exploit opportunities to object to power.[307]

Adopting Foucault's earlier concept of power without taking into consideration the criticism lodged against it creates a split between local subversiveness and hegemony, between agent and structure.[308] This concept of power and empowerment does not agree with the objective of the model, which is to advance processes of deconstructing hegemonic narratives and reconstructing a new interpretive framework. A local subversive story may, for a moment, undercut the original conflict story, but the deconstruction will be tactical, not strategic, because it will not succeed in relating the local subversiveness of individuals to the political and social structure.

Furthermore, the model's theory of power does not agree with practices of deconstruction and reconstruction exemplified previously. Whereas the theory of the model negates every type of essentiality connected with large

303. *Id.* at 41-51.

304. *Id.*

305. *Id.*

306. *Id.* at 49-51.

307. *Id.*

308. *See, e.g.*, Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115, 122 (1984); Stuart Henry, *Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative*, 19 LAW & SOC'Y REV. 303-04, 307 (1985); Hunt, *supra* note 180, at 32; Susan Silbey, *Making a Place for Cultural Analysis of Law*, 17 LAW & SOC. INQUIRY 39, 46-48 (1992).

narratives, it appears from the example of the Fiona and Greg mediation that the narrative mediator assists the parties in deconstructing big hegemonic narratives and in identifying the manner in which the parties affect their points of view in relation to the dispute.

There exists, then, a gap between the ideology and practice of the model. The ideology is based on a radical, postmodern perception of power that does not recognize the existence of social structures. In contrast, the reality of mediation practices portray the mediator as having a social and political awareness that recognizes big power structures and strives to reveal their influence on the dispute through an ethic of equal partiality. This gap may limit the empowering potential of the model in the context of parties coming from disadvantaged groups.

To intensify the model's empowering potential, there is a need for a theory based on an ethic of equal partiality and a concept of power that recognizes the connection between small narratives and large narratives. Development of such a theory may be crucial in disputes between a dominant group and a culturally or socially disadvantaged group. Even though narrative mediation practices manage to deal relatively successfully with large-scale narratives of gender that appear in family disputes within the same cultural group, the absence of such theoretical development may make it difficult to cope effectively with large narratives that appear in polycentric disputes between various social and cultural groups. The narratives that appear in disputes of this sort differ from those of gender; whereas the woman, as Simone de Beauvoir argues, is perceived as a close "other,"[309] the social, cultural, or ethnic other group is considered a distant other. This is especially so if the ruling group shapes its identity on the basis of denigrating the other.

IV. CONCLUSION

In this article, I have examined whether the concept of the mediator's neutrality advances the effective participation of parties who come from disadvantaged groups. I argue that the self-evident status that the mediator's neutrality has gained is a product of the proximity between mediator's neutrality and judicial impartiality, creating a myth of neutrality with two dimensions: impartiality and a duty of trust that is reminiscent in character of the duty imposed on professionals. Continuous tension exists between the two dimensions of neutrality. Whereas impartiality entails preserving equal distance and demonstrating equal relations toward both parties without regard to their personalities and preferences, the necessity for gaining the

309. SIMONE DE BEAUVOIR, THE SECOND SEX 35-69 (H. M. Parshley trans., 1949).

parties' trust involves creating a personal relationship between the mediator and the parties, especially in the course of caucuses.

The two models of mediation attempt to settle the tension between these two aspects differently. The problem-solving model aspires to assign the mediator's role to "process" only and to leave full responsibility for the outcome or for the content in the hands of the parties. The problematic distinction between process and content—a product of the integration of principles of democratic participation with principles of adversarial-competitive participation—causes the mediator's neutrality to aspire, on the one hand, to advance a democratic process that leaves sovereignty of outcome in the hands of the parties, and on the other hand, to advance as close as possible to the model of judicial impartiality, which manifests a third party's wielding of covert power.

Alternatively, the transformative mediation model seeks to free itself of the distinction between process and content and, instead, adopts a no less problematic concept of radical neutrality, which is mainly grounded in the notion of impartiality—a notion that does not accord with the objective of empowerment and recognition.

It is my thesis that the tension between the two aspects of neutrality creates a myth of neutrality, since it embodies relations of structural coupling between two different ethical concepts: the concept of impartiality and the concept of care. The former ethic reflects objective justice and fairness, and it is manifested in a passive and distant stance and in the attempt to observe the dispute and the parties to it from behind a veil of ignorance or from a position of nowhere. In contrast, the ethic of care means responsibility toward the parties and concern for their needs; it is expressed in attitudes of empathy, involvement, understanding, and support. Impartiality necessitates a distinction between process and content, whereas care may obligate intervention by a third party, the mediator, in the content of the dispute.

The duality of the affinity to law and of the opposition to law establishes mediation as a regulatory site, in which mediation is simultaneously established as a democratic arena, where the individual participants are responsible, free, and autonomous, and as a competitive process run in the shadow of the law, which is intended to grant legitimacy and to constitute all who practice mediation as possessing a quality of neutrality. This duality establishes neutrality as a myth and masks the power that is at work in mediation, harming the effective participation of the parties, especially if they come from disadvantaged groups.

Despite the fact that structural coupling between impartiality and care acts to establish mediation as a site in which disciplinary power is executed, it is my contention that it has the power to work in an opposite fashion. This may be done by observing the concept of impartiality from within the prism of care. Such an observation undermines the significance of "view from nowhere" by pouring new meaning—multipartiality or omnipartiality—into the old vessel.[310] This new meaning deconstructs the dichotomy between care and impartiality and creates a new ethical concept: equal partiality.

The ethic of equal partiality embodies relations of mutual challenge between impartiality and care. The mediator is no longer an expert observing the dispute from nowhere, but is obliged to acknowledge his personal point of view and to show openness toward new viewpoints that are different from his opinion. Such a mediator aspires to see the unique faces of all participants, to listen to their personal stories, and to encourage a process of reflective narration that will enrich each party's original story with new meanings. This process may advance a dialogue that embodies principles of thick procedural justice, because it has the power to enable the stories of parties from disadvantaged groups, who up to now have not gained attention, to pave their way, perhaps for the first time, to the discussion table.

Finally, I presented the narrative mediation model and examined whether it is capable of furthering dialogic participation embodying principles of thick procedural justice. I argued that the narrative model is the only mediation model that viewed life stories and other forms of subversive stories as the very heart of the process. Nevertheless, two conceptual problems may stand in the way. First, its tendentious criticism of the perception of needs, which does not take into account the possibility that a solution based on needs may fulfill an empowerment function; second, its absence of an alternative ethic to neutrality. I proposed tightening the connection between theory and practice by adopting an ethical concept of equal partiality and grounding the model on a broader theory of power that recognizes the relationship between local power and the social and political structure. Such a theoretical repair might be crucial in polycentric disputes, in which different cultural, ethnic, and social groups are involved.

Despite its faults, the narrative mediation model, in my opinion, demonstrates that the possibility of an empowering dialogue administered by a mediator possessing social awareness is not a wild dream. Such mediators need not enjoy exceptional theoretical capabilities, even though they must undergo training different from that of mediators who operate according to the problem-solving model or the transformative model. Training for this

310. *See* YOUNG, *supra* note 207, at 113.

kind of mediation should include a basic study of the concept of hegemony, an understanding of the meaning of equal partiality, and practical exercises in deconstruction and reconstruction.[311] The development of mediator training programs in this spirit harbors significant empowerment potential for parties from disadvantaged groups.

311. For a recommendation on training in this spirit, see Gunning, *supra* note 14, at 86-87.